1992

Business Guides, Inc. v. Chromatic Communications Enterprises: The Case For Rule 11 Reform

Scott B. Gilly

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
Pursuant to its rulemaking authority, the United States Supreme Court prescribed the Federal Rules of Civil Procedure in 1938. The Federal Rules secured one form of action by unifying the procedure for cases at law, in equity, and in admiralty. Each federal rule is designed to secure the just and efficient determination of every civil action brought in the United States district courts. The current Federal Rule of Civil Procedure 11 (Rule 11),


2. The original Federal Rules of Civil Procedure were adopted by the Supreme Court on December 20, 1937, were submitted to the 75th Congress on January 3, 1938, and became effective on September 16, 1938. See CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 27-28 (2d ed. 1987); JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 86.02, at 86-5 (2d ed. 1991).

3. FED. R. CIV. P. 2. Rule 2 provides that "[t]here shall be one form of action to be known as 'civil action.' " Id.

4. See id.

5. See FED. R. CIV. P. 1. Rule 1 provides in part that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Id.

6. Rule 11 currently reads as follows:
   [1] Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. [3] Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. [4] The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. [5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [6] If a pleading, motion, or other paper is not signed, it shall be stricken.
for example, requires every pleading, motion, or other paper to be signed by an attorney or unrepresented party. It further provides that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge . . . formed after a reasonable inquiry it is well grounded in fact and is warranted by existing law." The plain language of Rule 11 imposes an affirmative duty upon attorneys and pro se litigants to certify that prior to filing any paper with the court, they conduct a reasonable inquiry and conclude that the paper is legally tenable and well grounded in fact.

Rule 11 articulates a distinct standard by which the signer's prefilng inquiry is measured. Specifically, all thirteen federal circuits have held that an attorney's certification is evaluated by an objective standard of reasonableness under the circumstances. The objective reasonable inquiry standard of Rule 11 similarly applies to unrepresented litigants, although the courts may take into account the special circumstances characterizing pro se situations. A primary purpose of the objective standard is to broaden the
range of circumstances in which the courts will impose sanctions and thereby increase Rule 11's effectiveness in deterring abuses of the litigation process.\textsuperscript{13}

Although interpretation of Rule 11 is uniform with regard to the standard imposed upon attorneys and unrepresented parties, a conflict developed between the United States Courts of Appeals for the Second and Ninth Circuits. The circuits disagreed on whether Rule 11 imposes an objective reasonable inquiry standard upon represented parties as well when they have signed a pleading, motion, or other paper. In \textit{Calloway v. Marvel Entertainment Group},\textsuperscript{14} the United States Court of Appeals for the Second Circuit vacated sanctions against a represented party because the district judge, in imposing sanctions, appeared to have applied an objective test to the party's conduct.\textsuperscript{15} The Second Circuit determined that Rule 11 sanctions should not fall upon a represented party unless that party intentionally misleads his attorney or is personally aware that his filing and signing of a pleading was wrong.\textsuperscript{16} The Second Circuit, therefore, distinguishes attorneys from represented litigants for Rule 11 purposes and holds the latter to a subjective bad faith standard.\textsuperscript{17}

In \textit{Business Guides, Inc. v. Chromatic Communications Enterprises},\textsuperscript{18} the United States Court of Appeals for the Ninth Circuit rejected the Second Circuit's rationale in \textit{Calloway} and refused to adopt a subjective standard for represented parties.\textsuperscript{19} Based upon its reading of the text of Rule 11 and the Advisory Committee's Note, the Ninth Circuit concluded that application of an objective reasonable inquiry standard to represented parties is "consistent with the primary purpose behind Rule 11: deterrence of frivolous litiga-

\textsuperscript{13} FED. R. Civ. P. 11 advisory committee's note.


\textsuperscript{15} \textit{Id.} at 1474. Specifically, the court held that an objective test "is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys." \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} The court fortified its distinction between attorneys and their clients on the grounds that good faith does not excuse misconduct by attorneys, who are licensed professionals expected to measure up to minimum standards of competence and professional responsibility. \textit{Id.; see also Cross & Cross Properties v. Everett Allied Co.,} 886 F.2d 497 (2d Cir. 1989) (following \textit{Calloway}); \textit{Greenberg v. Hilton Int'l}, 870 F.2d 926 (2d Cir. 1989) (same).

\textsuperscript{18} 892 F.2d 802 (9th Cir. 1989), \textit{aff'd}, 111 S. Ct. 922 (1991).

\textsuperscript{19} \textit{Id.} at 810-11. The opinion methodically considers and rejects each factor cited in \textit{Calloway} in support of a subjective standard for represented parties. \textit{Id.; accord Cleveland Demolition Co. v. Azcon Scrap Corp.,} 827 F.2d 984, 987-88 (4th Cir. 1987); \textit{Portnoy v. Warehouse Entertainment Co.,} 120 F.R.D. 73, 74 (N.D. Ill. 1988).
The Supreme Court granted certiorari to address whether Rule 11 "imposes an objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or other papers." The Business Guides case originated as an action filed in the United States District Court for the Northern District of California, claiming copyright infringement and seeking a temporary restraining order (TRO). Business Guides, Inc. (Business Guides), a publisher of a computer products and services directory, deliberately planted erroneous information, known as "seeds," in its published directories. Business Guides pioneered the seeding method in an effort to protect itself against copyright infringement by competitors. The presence of these seeds in a competitor's directory constitutes strong evidence of copyright infringement.

In support of its complaint against Chromatic Communications Enterprises, Inc. (Chromatic), Business Guides submitted to the court several affidavits identifying the presence of ten seeds in Chromatic's directory. Various Business Guides' employees involved in the seeding process signed these affidavits before they were filed in district court. The district court judge's law clerk, prior to the hearing on the TRO, spent approximately one hour telephoning the businesses identified by Business Guides as seeds and discovered that all but one of the seeds actually contained accurate information. Based on this discovery, the district court denied the TRO, stayed further proceedings, and referred the matter to a magistrate to determine whether Rule 11 sanctions should be imposed against Business Guides.

---

20. Business Guides, 892 F.2d at 811. For a discussion of the purposes behind Rule 11, see infra text accompanying notes 78-85.
24. Id. Business Guides utilized two types of seeds: "Type A" seeds were entirely fictitious entries of nonexistent businesses, and "Type B" seeds were minor alterations such as misspelled names or transposed numbers in otherwise accurate listings. Business Guides, 892 F.2d at 804.
28. Id. Upon further investigation, Business Guides retracted its claim of copying with respect to three of the ten original seeds because they in fact contained correct information. Business Guides submitted a supplemental affidavit supporting its claim as to the remaining seven seeds. Business Guides, 892 F.2d at 805.
29. Id. at 804-05.
30. Id. at 805.
31. Business Guides, 119 F.R.D. at 687. The sanction proceedings before the magistrate concerned both Business Guides and its attorneys, the law firm of Finley, Kumble, Wagner,
After three evidentiary hearings, the magistrate found that although Business Guides had acted in good faith, Rule 11 sanctions were nevertheless appropriate because Business Guides failed to conduct a reasonable inquiry. The district court adopted the magistrate's findings and held that "[t]he standard of conduct under Rule 11 is one of objective reasonableness. Applying this standard to the circumstances in this case, it is clear that ... Business Guides . . . violated the Rule." Business Guides was subsequently ordered to pay to Chromatic $13,865.66 for legal expenses and costs as a sanction. On appeal, the United States Court of Appeals for the Ninth Circuit rejected Business Guides' argument that represented parties may not be sanctioned under Rule 11 and affirmed the district court's holding that Business Guides was subject to an objective standard of reasonable inquiry into the factual basis of the affidavits filed in support of its TRO application.

The United States Supreme Court affirmed the decision. The Court held that the certification requirement of Rule 11 applies to represented parties in addition to attorneys and pro se litigants. The Court also determined that represented parties are held to the same objective standard that is imposed on attorneys and pro se litigants under Rule 11. Thus, Rule 11 sanctions against Business Guides were held to be proper where the company failed to conduct a reasonable inquiry before signing the affidavits in support of its initial TRO application.

Heine, Unterberg, Manley, Myerson & Casey. Sanctions against the law firm, however, were not an issue in this case because Finley, Kumble dissolved, and sanction proceedings against it were stayed pursuant to the Bankruptcy Code. See Business Guides, Inc. v. Chromatic Communications Enters., 121 F.R.D. 402, 403 (N.D. Cal. 1988).

32. The magistrate accepted Business Guides' explanation that a departure from its normal methodology in compiling its "master seed list" resulted in the seeded listings actually containing correct information. Business Guides, 892 F.2d at 806.

33. Business Guides, 119 F.R.D. at 687. The magistrate decided that sanctions against Business Guides were appropriate because the company failed to conduct a reasonable inquiry, resulting in the presentation of erroneous material which it "knew or should have known [was] unreliable for the purpose of creating evidence of copyright infringement." Id.

34. Id. at 688-89.


36. Business Guides, 892 F.2d at 812. The court of appeals, however, vacated the order of sanctions and remanded the case to the district court for reconsideration on other grounds. Id. at 813.


38. Id. at 929-31.

39. Id. at 931-33.

40. Id. at 935.
Finally, the Court held that imposing monetary sanctions against a represented party that acts in good faith does not constitute impermissible fee-shifting in violation of the Rules Enabling Act. The majority differentiated between legislatively prescribed fee-shifting, in which the prevailing party is awarded attorney's fees, and Rule 11 sanctions. Having determined that its application of Rule 11 was consistent with the Rules Enabling Act, the majority affirmed the judgment of the Ninth Circuit.

Justice Kennedy, in his dissent, rejected the application of an objective reasonable inquiry standard to represented parties, favoring instead a subjective bad faith standard in determining whether a represented party violated Rule 11. Justice Kennedy concluded that Rule 11 binds only those parties whose signatures are provided for in the Rule itself. Because the amended version of the Rule only requires the signature of an attorney or pro se litigant, Justice Kennedy reasoned that an attorney must violate Rule 11 before a represented party can be sanctioned and that the sanction would be an abuse of discretion unless the represented party acted in bad faith.

Justice Kennedy also argued that the majority's interpretation of Rule 11 exceeds the Court's rulemaking authority by permitting fee-shifting in the absence of bad faith. Alternatively, the dissent emphasized the chilling effect that will likely result from the Court's extension of a valid Federal Rule well beyond its traditional scope. On either ground, the dissent concluded that the majority's interpretation of Rule 11 was improper.

This Note examines the development of Rule 11 sanctions on attorneys and represented parties. It first examines Rule 11 of the Federal Rules of Civil Procedure and its 1983 amendment. This Note then surveys the relevant judicial and scholarly criticism that has evolved since the amendment. Next, this Note analyzes the United States Supreme Court's decision in Business Guides, Inc. v. Chromatic Communications Enterprises in light of this prior criticism. This Note concludes that even though Business Guides ad-

---

41. Id. at 933-34.
42. Id. at 934. The Court pointed out that "Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was [frivolous]. Nor do sanctions shift the entire cost of litigation; they shift only the cost of a discrete event." Id.
43. Id. at 934-35.
44. Id. at 943 (Kennedy, J., dissenting). Justice Kennedy's dissent was joined by Justices Marshall and Stevens, and was joined in part by Justice Scalia. Id. at 935.
45. Id. at 936.
46. Id. at 942-43.
47. Id. at 940-41.
48. Id. at 940-42. "Whether or not Rule 11 as construed by the majority exceeds our rulemaking authority, these concerns weigh in favor of a reasonable, alternative interpretation, one which . . . is more consistent with the text of the Rule." Id. at 942.
49. Id.
Rule 11 Reform

vances the purpose behind the 1983 amendment, the decision is unfaithful to the plain language of the Rule. This Note recommends that Rule 11 be revised in order to effectively regulate abuses of the judicial system.

I. THE DEVELOPMENT OF RULE 11

A. The Rulemaking Process

Rule 11's development began with the original promulgation of the Federal Rules of Civil Procedure in 1938.50 The Supreme Court appointed an Advisory Committee of distinguished lawyers and law professors to prepare and submit to the Court a draft of the Federal Rules.51 Advisory Committee drafts were repeatedly distributed for public comment and discussed by the Judicial Conference of the United States.52 After carefully revising the final draft recommended by the Advisory Committee,53 the Supreme Court adopted the Federal Rules and submitted them to the Congress.54 The Rules Enabling Act requires no affirmative adoption of the Federal Rules by Congress; therefore, the Federal Rules of Civil Procedure became effective with the adjournment of the 75th Congress in 1938.55

Amendments to the Federal Rules must be made in accordance with the procedures prescribed by the Judicial Conference.56 Proposed rules and amendments are recommended by the Advisory Committee on Civil Rules.57 A proposed change is then reviewed by the Standing Committee on Rules of Practice and Procedure, which recommends the proposal to the Judicial Conference for adoption by the Supreme Court.58 Once the proposal is adopted, the Supreme Court must submit it to Congress no later than May 1 of the year in which the proposal would become effective.59 Unless Congress acts otherwise, the proposed rule or amendment becomes effective no earlier than December 1 of the year in which the proposal was submitted.

52. See 4 WRIGHT & MILLER, supra note 2, at 24-26.
53. See 4 id. at 25.
55. See 4 WRIGHT & MILLER, supra note 2, at 27-28.
to Congress. In addition to the rulemaking process, a contemporary understanding of Rule 11 is further enhanced by an examination of the text of the original version of the Rule.

B. Original Rule 11

Adopted as part of the 1938 Federal Rules of Civil Procedure, the original version of Rule 11 concentrated and unified pleading practices in existence at the time. Most notably, the original version of Rule 11 incorporated the Federal Equity practice requiring counsel's signature as an affirmation that there was good grounds for a pleading. The original version of Rule 11 provided in pertinent part that "[t]he signature of an attorney constitutes a certification by him that . . . there is good ground to support [a paper]; and that it is not interposed for delay." This certification standard indicates that original Rule 11 was intended to secure a lawyer's subjective honesty.

While the focus of the subjective certification standard was the conduct of the attorney, the only explicitly authorized sanction for a violation of the original Rule was aimed at the client. A pleading filed in violation of origi-

---

60. Id.
61. The original Rule 11 read as follows:
   Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

63. See Risinger, supra note 50, at 8-14. The "good grounds" certification requirement found in Rule 24 of both the 1842 and 1912 Equity Rules was intended to "secure lawyer honesty." Id. at 13-14.
64. See supra note 61 (quoting the complete text of original Rule 11).
66. See Risinger, supra note 50, at 14.
68. "If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken . . . and the action may proceed as though the pleading had not been served." Id.
Rule 11 Reform

Original Rule 11 was to be stricken, whereas disciplinary action against the attorney was to be taken only for a "wilful violation" of the Rule. Faced with this draconian sanction, which often penalized innocent clients, and the difficulty of determining subjective bad faith, the courts were reluctant to utilize the Rule. Consequently, original Rule 11 withered and became an ineffective tool for deterring abuses of the litigation process. By the early 1980's, however, the federal judicial system experienced a "litigation explosion," marked by the excessive use and frequent abuse of the litigation process, which necessitated an effective rule for disciplining litigants and their attorneys.

69. Id.
70. Id.; see, e.g., Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166-67 (7th Cir. 1983) (construing "willful violation" to require a subjective bad faith test); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (same).
72. See FED. R. CIV. P. 11 advisory committee's note (stating that "[e]xperience shows that in practice [original] Rule 11 has not been effective in deterring abuses"); see also Risinger, supra note 50, at 34-37 (observing that between 1938 and 1976, there were only 19 genuine Rule 11 motions reported); Nelken, Sanctions, supra note 71, at 1315-16 (commenting on the lack of effectiveness of original Rule 11).
73. See, e.g., Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN. L. REV. 1, 2-12 (1984) (attributing the tremendous increase in litigation to (1) the changing demography of the legal profession, (2) the proliferation of federal substantive rights, (3) the liberal and egalitarian notice pleading system, and (4) economic incentives of contemporary litigation); see also Bayless Manning, Hyperlexis: Our National Disease, 71 NW. U. L. REV. 767 (1977) (describing the litigation explosion as "hyperlexis"). But see Marc Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3, 28-39 (1986) (arguing against the destructive consequences of the litigation explosion by pointing to anecdotal benefits obtained by resort to the judicial system); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 61-71 (1983) (arguing that the litigation explosion, or hyperlexis, is not a crisis but rather is a necessary, although not optimal, adaptation to changing social conditions).
C. 1983 Amendment

In an effort to deter frivolous and unfounded litigation, the United States Supreme Court amended Rule 11 in 1983. The amendment reflected a deliberate effort to correct the deficiencies that plagued the original version of the Rule and to thereby craft a tool to effectively protect the judicial system from abusive litigation tactics.

1. The Purpose of Amended Rule 11

Commentary concerning the underlying purpose of Rule 11 sanctions vacillates among three possibilities—compensation, punishment, and deterrence. It is generally recognized, however, that deterrence is the central purpose behind the amended Rule. This school of thought follows naturally from the purposes behind the amended Rule 11.


76. The Advisory Committee's Note accompanying the 1983 amendment indicated that "[t]here has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions." FED. R. CIV. P. 11 advisory committee's note; see supra notes 61-74 and accompanying text.

77. See infra notes 78-85 and accompanying text for a discussion of the purposes behind the 1983 amendment to Rule 11.


79. See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (concluding that "the imposition of sanctions pursuant to Rule 11 is meant to deter attorneys from violating the rule"); In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986) (ruling that the primary purpose of Rule 11 "is to deter subsequent abuses"); Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 564-65 (E.D.N.Y. 1986) (focusing on deterrence as Rule 11's primary purpose), modified, 821 F.2d 121 (2d Cir.) (Eastway II), cert. denied, 484 U.S. 918 (1987); see also Burbank, Transformation, supra note 78, at 1944 (pointing out that Rule 11 is intended to effect both specific and general deterrence); Kramer, supra note 78, at 803 (recognizing that the purpose of Rule 11 sanctions is to deter frivolous conduct); William W. Schwarzer, Rule 11 Revisited, 101 HARV. L. REV. 1013, 1019-20 (1988) [hereinafter Schwarzer, Revisited] (stating that "[t]he proper role of rule 11... is to deter litigation abuse"); Untereiner, supra note 78, at 903 (recognizing that the purpose of Rule 11 sanctions is to deter frivolous conduct).
rally from the clear emphasis on deterrence found in the Advisory Committee's Note accompanying the 1983 amendment.\textsuperscript{80}

The United States Supreme Court addressed the underlying purpose of Rule 11 in \textit{Cooter & Gell v. Hartmarx Corp.}\textsuperscript{81} In \textit{Cooter & Gell}, the Court summarily\textsuperscript{82} asserted that Rule 11's overriding goal is the deterrence of abusive litigation practices in the federal courts.\textsuperscript{83} The interpretation that Rule 11's purpose is to deter baseless filings is strengthened by an examination of the two major substantive changes in the body of the amended Rule: the adoption of an objective certification standard\textsuperscript{84} and the expanded scope of sanctions.\textsuperscript{85}

2. \textit{The Objective Certification Standard}

The most significant change effected by the 1983 amendment to Rule 11 was the explicit adoption of an objective certification standard.\textsuperscript{86} As evidenced by the Advisory Committee's Note, the objective standard was intended to increase Rule 11's deterrent effect by requiring a prefiling inquiry into both the facts and the law contained in the paper.\textsuperscript{87} Indeed, original Rule 11's failure in this regard prompted the Rule's revision in 1983.\textsuperscript{88}

\begin{quote}
\textsuperscript{78} at 912 (arguing that judicial acceptance of deterrence as the primary purpose would promote uniformity in Rule 11 sanctions).

\textsuperscript{80} See \textit{Fed. R. Civ. P. 11} advisory committee's note (stating that "[t]he word 'sanctions' in the caption . . . stresses a deterrent orientation in dealing with improper pleadings, motions or other papers"). Nevertheless, judicial opinions frequently argued that the competing rationales were paramount. \textit{E.g., Eastway II}, 821 F.2d at 124-26 (dissenting opinion); \textit{In re TCI}, Ltd., 769 F.2d 441, 446 (7th Cir. 1985).

\textsuperscript{81} 496 U.S. 384 (1990).

\textsuperscript{82} The Supreme Court's determination was apparently based solely on the Advisory Committee's Note accompanying the 1983 amendment and the legal commentary of William W. Schwarzer and Georgene M. Vairo. See id. at 393 (citing to Schwarzer, \textit{A Closer Look}, supra note 74, and Vairo, \textit{supra} note 78).

\textsuperscript{83} Id. The Court stated that "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings . . . and thus . . . any interpretation must give effect to the rule's central goal of deterrence." \textit{Id.} (citations omitted).

\textsuperscript{84} See infra notes 86-104 and accompanying text.

\textsuperscript{85} See infra notes 105-29 and accompanying text.

\textsuperscript{86} "[5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . ." \textit{Fed. R. Civ. P. 11}.

\textsuperscript{87} \textit{Fed. R. Civ. P. 11} advisory committee's note (reporting that "[t]he standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation") (citation omitted).

\textsuperscript{88} See \textit{supra} notes 61-74 and accompanying text for a description of the ineffectiveness of original Rule 11.
Sentences [1] and [2] of the Rule require the signature of an attorney or a pro se litigant, respectively, to appear on every pleading, motion, and other paper.\textsuperscript{89} Sentence [5] explains in detail the significance attached to the signature of an attorney or party by Rule 11.\textsuperscript{90} Such a signature certifies that the signer has performed a reasonable inquiry and concluded that the paper "is well grounded in fact and is warranted by existing law."\textsuperscript{91} Whether the signer has conducted a reasonable inquiry depends, \textit{inter alia}, upon such factors as the amount of time available to the signer for investigation and whether the signer relied on a client for the facts underlying a paper.\textsuperscript{92}

In \textit{Eastway Construction Corp. v. City of New York},\textsuperscript{93} the United States Court of Appeals for the Second Circuit adopted the objective standard of reasonableness under the circumstances for Rule 11.\textsuperscript{94} In response to the widespread corruption that infected New York City's housing rehabilitation loan program, the City enacted sweeping changes in the program's policy which effectively barred Eastway Construction Corporation (Eastway) from receiving any rehabilitation contracts.\textsuperscript{95} Eastway then filed a lawsuit in the United States District Court for the Eastern District of New York, alleging civil rights and antitrust violations by the City.\textsuperscript{96} The district court granted the City's motion for summary judgment and dismissed Eastway's action, finding no basis for either claim.\textsuperscript{97} The City's motion for attorney's fees, however, was denied.\textsuperscript{98}

The Second Circuit affirmed the dismissal of Eastway's action.\textsuperscript{99} The court remanded the case, however, ordering the district court to award an appropriate attorney's fee pursuant to Rule 11.\textsuperscript{100} The court held that a

\begin{itemize}
  \item \textsuperscript{89} "[1] Every . . . paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . [2] A party who is not represented by an attorney shall sign the party's . . . paper . . . ." FED. R. CIV. P. 11.
  \item \textsuperscript{90} See supra note 86.
  \item \textsuperscript{91} FED. R. CIV. P. 11. For purposes of this Note, the "improper purpose" clause of sentence [5] is irrelevant and will not be discussed.
  \item \textsuperscript{92} FED. R. CIV. P. 11 advisory committee's note.
  \item \textsuperscript{93} 762 F.2d 243 (2d Cir. 1985) (\textit{Eastway I}).
  \item \textsuperscript{94} \textit{Id.} at 253-54.
  \item \textsuperscript{95} \textit{Id.} at 246.
  \item \textsuperscript{96} \textit{Id.} at 248. Prior to the district court proceedings, Eastway initiated a state action in the New York State Supreme Court. This lawsuit was eventually dismissed. \textit{Id.} at 247 (citing \textit{Eastway Constr. Corp. v. Gliedman}, 446 N.Y.S.2d 306 (N.Y. App. Div. 1982)).
  \item \textsuperscript{97} \textit{Id.}
  \item \textsuperscript{98} \textit{Id.} The City moved for attorney's fees on multiple grounds, including Rule 11. \textit{Id.} at 252-53.
  \item \textsuperscript{99} \textit{Id.} at 254.
  \item \textsuperscript{100} \textit{Id.} On remand, the district court awarded the City of New York $1,000 in attorney's fees under Rule 11. \textit{Eastway Constr. Corp. v. City of New York}, 637 F. Supp. 558, 584 (E.D.N.Y. 1986), \textit{modified}, 821 F.2d 121 (2d Cir.), \textit{cert. denied}, 484 U.S. 918 (1987). The
violation of Rule 11 does not require a finding of subjective bad faith. Rather, according to the Second Circuit, the failure to conduct a reasonable inquiry into the viability of a paper constitutes a violation of the Rule. In Eastway, the Second Circuit concluded that Eastway's claims were groundless and that a reasonable inquiry would have led a competent attorney to reach the same conclusion. By 1988, all thirteen federal circuits had adopted the objective standard contained in the 1983 amendment to the Rule.

3. The Expanded Scope of Sanctions

The second significant change to Rule 11 was the development of a more effective sanctioning provision. The 1983 amendment to the Rule expanded the scope of Rule 11 sanctions in two ways. First, in response to the judicial reluctance to impose sanctions under original Rule 11, the court's discretion with regard to the imposition of sanctions was removed, making sanctions for the violation of Rule 11 mandatory. Secondly, the courts were granted broad discretion with regard to the nature and target of the sanctions under the amended language of the Rule.

In order to make sanctions for the violation of amended Rule 11 mandatory, sentence [7] states that a court "shall impose" sanctions when a signature violates the Rule. The Advisory Committee's Note accompanying the 1983 amendment highlights the mandatory nature of Rule 11 sanctions. Specifically, the Advisory Committee's Note states that "the words

Second Circuit modified the sanction on appeal to $10,000. Eastway II, 821 F.2d 121, 122 (2d Cir.), cert. denied, 484 U.S. 918 (1987).

101. Eastway I, 762 F.2d at 253-54. Referring to original Rule 11, Judge Kaufman stated that "[n]o longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. ... Simply put, subjective good faith no longer provides the safe harbor it once did." Id. at 253; see also Schwarzer, A Closer Look, supra note 74, at 187 (noting that "[t]here is no room for a pure heart, empty head defense under Rule 11").

102. Eastway I, 762 F.2d at 253-54.

103. Id. at 254.

104. See supra note 11; cf: Risinger, supra note 50, at 59-61 (foreshadowing Rule 11's transition to an objective standard).

105. "[7] If a ... paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction ... ." FED. R. CIV. P. 11.

106. See supra text accompanying notes 67-74.

107. See FED. R. CIV. P. 11; infra note 113 and accompanying text; cf: Schwarzer, A Closer Look, supra note 74, at 200 (predicting that courts will not "consider themselves bound by the rule's mandatory language").

108. See FED. R. CIV. P. 11; infra note 113 and accompanying text.

‘shall impose’ in the last sentence focus the court’s attention on the need to impose sanctions for pleading and motion abuses.”

Although sanctions for the violation of Rule 11 are mandatory, the nature and target of the sanctions are discretionary. Sentence [7] provides that when a paper is signed in violation of Rule 11, the court “shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.” Thus, the court retains discretion with regard to what constitutes an appropriate sanction as well as upon whom that appropriate sanction should be imposed. The plain language of the Rule as well as the Advisory Committee’s Note have led courts to interpret sentence [7] as a mandatory provision requiring the imposition of a discretionary sanction.

In *Thomas v. Capital Security Services, Inc.*, the United States Court of Appeals for the Fifth Circuit adopted the interpretation that Rule 11 mandates the imposition of a discretionary sanction. Several employees filed a Title VII civil rights class action against their employer, Capital Security Services, Inc. (Capital). After a three day bench trial in which Capital prevailed on the merits, the district court denied the employer’s motion for attorney’s fees. The Fifth Circuit vacated and remanded the district court’s order denying attorney’s fees. The court held that once a violation of Rule 11 is determined, the district court no longer has the option to choose whether to impose sanctions.

In *Thomas*, the Fifth Circuit adopted the interpretation that sanctions are mandatory under Rule 11 once a violation of the Rule is established. The court emphasized that the mandatory nature of sentence [7] was designed to

---

110. FED. R. CIV. P. 11 advisory committee’s note.
111. The Advisory Committee’s Note states that the court “has discretion to tailor sanctions to the particular facts.” Id.
112. FED. R. CIV. P. 11.
113. See Edward D. Cavanagh, Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure, 14 HOFSTRA L. REV. 499, 500 (1986) (recognizing that sanctions are mandatory yet judges have broad discretion both in choosing the appropriate penalty and the appropriate target); Nelken, Sanctions, supra note 71, at 1321-22 (same); Vairo, supra note 78, at 193-94 (same).
114. For example, in *Eastway I*, the court specifically stated, “Rule 11 is clearly phrased as a directive. . . . At the same time, however, we note that the district courts retain broad discretion in fashioning sanctions.” *Eastway I*, 762 F.2d 243, 254 n.7 (2d Cir. 1985).
115. 836 F.2d 866 (5th Cir. 1988).
116. Id. at 876-78.
117. Id. at 868. The plaintiffs-employees alleged that Capital’s business practices were discriminatorily motivated on the basis of both race and sex. Id.
118. Id.
119. Id. at 869.
120. Id. at 876-78
121. Id. at 876.
maximize the deterrent effect of Rule 11 sanctions.\textsuperscript{122} Recognizing that a mandatory sanction could potentially chill legitimate advocacy, the \textit{Thomas} court cited to the discretionary component of the Rule as a balancing factor from which “it can be inferred that the broad discretion given district courts in determining sanctions was intended as a 'safety valve' to reduce the pressure of mandatory sanctions.”\textsuperscript{123}

Rule 11 authorizes judges to exercise their discretion with regard to sanctions in two ways: the appropriate nature of the sanction and the appropriate target of the sanction.\textsuperscript{124} In \textit{Thomas}, for example, the court speculated that an appropriate sanction can range from a verbal admonishment from the bench to an award of attorney’s fees.\textsuperscript{125} In addition to the appropriate nature of a sanction, the deterrent effect of Rule 11 is enhanced by selecting the appropriate party to sanction.\textsuperscript{126} In \textit{Eastway}, for example, the court concluded that Rule 11 authorizes the trial court to allocate sanctions between the attorney and his client in accordance with whomever is responsible for the frivolous filing.\textsuperscript{127}

Upon a comparison with original Rule 11, it is clear that the 1983 amendment sought to fashion a rule which would effectively reduce abuses of the litigation process.\textsuperscript{128} The objective certification standard and the expanded scope of the sanctioning provision are the two primary tools by which the courts are empowered to pursue this ambition.\textsuperscript{129} The judicial application of these tools, however, has raised several concerns.

\textsuperscript{122} \textit{Id.} (citing Nelken, \textit{Sanctions, supra} note 71, at 1322).

\textsuperscript{123} \textit{Id.} at 877.


\textsuperscript{125} \textit{Thomas}, 836 F.2d at 878. Specifically, the court speculated that an appropriate sanction “may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, [or] monetary sanctions.” \textit{Id.} The court continued, “[w]hatever the ultimate sanction imposed, the district court should utilize the sanction that furthers the purposes of Rule 11.” \textit{Id.}

In accordance with sentence [7] of Rule 11, however, courts tend to impose a reasonable attorney’s fee most often under Rule 11. \textit{See} Elizabeth C. Wiggins et al., \textit{The Federal Judicial Center's Study of Rule 11}, FJC DIRECTIONS, Nov. 1991, at 3, 18 (reporting that in the five districts studied, monetary fees payable to the opposing party were the sanction imposed in 70% to 93% of the Rule 11 sanction orders); Nelken, \textit{Sanctions, supra} note 71, at 1333 (noting that attorney’s fees were the sanction imposed in 96% of the Rule 11 orders issued in the first two years after the Rule's amendment).

\textsuperscript{126} \textit{See, e.g., Eastway}, 637 F. Supp. at 569.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{See supra} notes 61-74 and accompanying text.

\textsuperscript{129} \textit{See supra} notes 86-127 and accompanying text.
II. Rule 11 Criticism

The 1983 amendment of Rule 11 has generated three categories of criticism relevant to Business Guides. The three relevant categories are (1) the Rule's unpredictability, (2) satellite litigation, and (3) the Rule's basis of authority.

A. Unpredictable Application

The central purpose of amended Rule 11 is deterrence of abusive litigation practices in the federal courts. The unpredictable application of the Rule's language, however, undermines its deterrent effect. Commentators decried the indeterminate application of amended Rule 11's language across both judges and circuits.

Courts have also recognized the detrimental effect that inconsistent application of Rule 11 has on the deterrence of abusive conduct. For example, the dissenting opinion in International Shipping Co. v. Hydra Offshore, Inc. challenged the majority's decision on this very ground. In International Shipping, the United States Court of Appeals for the Second Circuit affirmed an order imposing Rule 11 sanctions on an attorney for seeking a temporary restraining order in federal district court without conducting a

130. These categories of criticism are implicated by the Supreme Court's decision in Business Guides, Inc. v. Chromatic Communications Enters., 111 S. Ct. 922 (1991). For a discussion of the Business Guides decision in relation to the criticism of Rule 11, see infra notes 222-37 and accompanying text.

131. See infra notes 134-55 and accompanying text.

132. See infra notes 156-64 and accompanying text.

133. See infra notes 165-77 and accompanying text.

134. See supra notes 78-85 and accompanying text (discussing the purpose of the 1983 amendment to Rule 11).

135. Simply stated, "if litigants and attorneys do not have adequate notice as to what constitutes a violation, the rule's deterrent value [is] undermined." Wiggins et al., supra note 125, at 11.

136. Burbank, Transformation, supra note 78, at 1930 (indicating that there is a conflict "on practically every important question of interpretation and policy under the Rule"); Kramer, supra note 78, at 794-802 (demonstrating statistically the inconsistency among circuits in deciding what constitutes a Rule 11 violation and how sanctions should be allocated); Nelken, Sanctions, supra note 71, at 1329-31 (finding "little consistency among judges . . . concerning the characteristics of an 'objectively' unacceptable pleading"); Schwarzer, Revised, supra note 79, at 1015-19 (characterizing the unpredictability under Rule 11 as "a veritable Tower of Babel"); Vairo, supra note 78, at 202 (attributing Rule 11's unpredictability to the failure of the appellate courts to provide guidance on the Rule's interpretation); Untereiner, supra note 78, at 902 (stating that a "problem recognized by both supporters and critics has been Rule 11's inconsistent application"). But see Wiggins et al., supra note 125, at 11-16 (reporting mixed findings regarding Rule 11's unpredictability).


138. See id. at 395 (Pratt, J., dissenting).
reasonable inquiry into the court’s subject matter jurisdiction. Judge Pratt dissented from the imposition of Rule 11 sanctions in this case on the grounds that no Rule 11 violation was found where another attorney, in another lawsuit, advanced the identical diversity jurisdiction argument made by the sanctioned attorney. Judge Pratt forcefully argued that consistent application of Rule 11 is critical to the Rule’s effectiveness.

In Cooter & Gell v. Hartmarx Corp., the Supreme Court acknowledged the corrosive effect that the unpredictable application of Rule 11 has on its deterrent capabilities. Noting that “any interpretation [of Rule 11] must give effect to the rule’s central goal of deterrence,” the Court then resolved three Rule 11 issues that had produced significant conflict at the circuit court level. In Cooter & Gell, the law firm of Cooter & Gell filed, on behalf of its client, several antitrust complaints which it later voluntarily dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Upon a Rule 11 motion, sanctions were imposed against the law firm because it conducted a “grossly inadequate” prefiling inquiry into the factual basis of its antitrust complaint.

The three issues presented by Cooter & Gell’s appeal to the Supreme Court had each become a source of conflict among the United States courts of appeal. First, the Court addressed whether the law firm’s voluntary dismissal of its antitrust complaint deprived the district court of jurisdiction to

139. Id. at 389, 393. Plaintiff’s action raised a complex issue of diversity jurisdiction involving foreign-incorporated, domestically-based corporations. The district court dismissed the action upon finding that complete diversity did not exist and awarded to the defendants $10,000 in attorney’s fees. Id. at 390-91.

140. Id. at 395 (Pratt, J., dissenting). Judge Pratt noted that “identical arguments asserted in the same district were held in one case not to violate rule 11, but to ‘egregious[ly]’ violate it in the next; yet the same body of appellate and statutory law was available to both courts.” Id. (alteration in original).

141. Id. The dissent warned that “it is critical that courts articulate clear, objective standards by which attorneys can reliably measure their conduct and that we avoid the corrosive effect of arbitrary, seemingly contradictory applications of the rule.” Id.


143. See id. at 393.

144. Id.

145. See id. at 398 (holding that a party’s voluntary dismissal under Rule 41(a)(1) does not divest the court’s jurisdiction to consider a Rule 11 motion); id. at 405 (holding that all aspects of a court’s Rule 11 determination should be reviewed on appeal under an abuse-of-discretion standard); id. at 409 (holding that Rule 11 does not authorize the court to award attorney’s fees incurred on appeal).

146. Id. at 388-89.

147. Id. at 389-90. The United States Court of Appeals for the District of Columbia Circuit affirmed the sanctions and remanded to the district court to determine an appropriate award for attorney’s fees incurred by Hartmarx Corporation in defending the appeal. Id. at 390-91. The Supreme Court affirmed in part and reversed in part. Id. at 409.
consider a Rule 11 motion.\textsuperscript{148} The Court held that Cooter & Gell’s voluntary dismissal pursuant to Rule 41(a)(1) did not divest the district court of jurisdiction to consider Hartmarx’s Rule 11 motion.\textsuperscript{149} Secondly, Cooter & Gell argued that the court of appeals did not apply an appropriate standard of review on appeal.\textsuperscript{150} The Supreme Court evaluated the differing standards applied in Rule 11 proceedings\textsuperscript{151} as well as the standards applied in analogous contexts before concluding that “an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court’s Rule 11 determination” rather than a three-tiered standard of review.\textsuperscript{152} Finally, the Court addressed whether it was error to award Hartmarx attorney’s fees for defending its Rule 11 sanction on appeal.\textsuperscript{153} The Court held that attorney’s fees could only be awarded in such circumstances in which

\begin{itemize}
\item \textsuperscript{148} Id. at 393-94. \textit{Compare} Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077-79 (7th Cir. 1987) (holding that the court may enforce Rule 11 after voluntary dismissal), \textit{cert. dismissed}, 485 U.S. 901 (1988) \textit{and} Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987) (same) \textit{and} Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 603-04 (1st Cir. 1988) (same) \textit{with} Johnson Chem. Co. v. Home Care Prods., 823 F.2d 28, 31 (2d Cir. 1987) (holding that voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings).
\item \textsuperscript{149} \textit{Cooter & Gell}, 496 U.S. at 398.
\item \textsuperscript{151} Three standards of appellate review in Rule 11 cases existed prior to \textit{Cooter & Gell}: (1) a tripartite standard in which courts review disputed factual determinations under a clearly erroneous standard, disputed legal conclusions under a \textit{de novo} standard, and disputed sanction awards under an abuse of discretion standard; (2) a variation on the tripartite standard in which courts review both disputed factual determinations and sanction awards under an abuse of discretion standard and disputed legal conclusions under a \textit{de novo} standard; (3) a uniform abuse of discretion standard in which courts review all aspects of a Rule 11 adjudication under a single standard. \textit{See} \textit{Cooter & Gell}, 496 U.S. at 399-401; \textit{see also} Louis Greco, Note, \textit{Standard of Appellate Review of Rule 11 Decisions}, 58 FORDHAM L. REV. 251, 256-60 (1989) (summarizing the three standards of review).
the appeal itself was frivolous because Rule 11 applies only in the district court. Comprehensive treatment of areas of lower court conflict similar to the *Cooter & Gell* opinion represent a growing sensitivity on the part of the courts to the unpredictability of amended Rule 11.

### B. Satellite Litigation

As evidenced in *Cooter & Gell*, the unpredictable application of Rule 11 not only undermines deterrence, it also results in a judicial gridlock of conflicting opinions. It is no solution to merely endure confusion until the Supreme Court speaks to the issue as it did in *Cooter & Gell* because such discord in the lower courts spaws further litigation. “Satellite litigation” is the ancillary hearings and discovery required in order to administer sanctions under Rule 11, and it provides another source of criticism of the 1983 amendment.

Given that the primary purpose of amended Rule 11 is “to streamline the litigation process by lessening frivolous claims or defenses” and thereby “to dam the flood of litigation that is threatening to inundate the courts,” a sanctioning provision that requires substantial satellite litigation would be self-defeating. Indeed, the Advisory Committee’s Note recommends that discovery and evidentiary proceedings be conducted only in extraordinary cases to avoid satellite litigation. Despite this admonition, however, sanction proceedings in the district courts are equally constrained by the require-

---


155. *See*, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 871 (5th Cir. 1988) (“By our opinion today, we seek to ameliorate this confusion and modify existing inequities to the extent possible by clarifying some of the more important issues presented by the application of Rule 11 . . . .”).

156. *See supra* notes 148, 150, 153.

157. *See generally* Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 387-89 (1990) [hereinafter Nelken, *Middle Ground*] (questioning whether the benefits of Rule 11 are outweighed by the burden of satellite litigation produced by the Rule); *Schwarzer, A Closer Look*, supra note 74, at 183 (identifying satellite litigation as a source of potential judicial reluctance to utilize Rule 11); *Schwarzer, Revisited*, supra note 79, at 1017-18 (pointing out that “Rule 11 has added substantially to the volume of motions in the district courts and appeals in the circuit courts”).

158. *FED. R. CIV. P.* 11 advisory committee’s note.


160. *See supra* note 79.

161. *See FED. R. CIV. P.* 11 advisory committee’s note. “To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.” *Id.*
ments of due process.\textsuperscript{162} Thus, courts frequently conduct extensive evidentiary hearings in order to determine whether a Rule 11 violation has occurred,\textsuperscript{163} as well as to assess the appropriate sanction to be imposed.\textsuperscript{164}

C. Questionable Basis of Authority

A third category of criticism exists concerning whether the federal courts’ sanctioning authority under amended Rule 11 is beyond the scope of the Rules Enabling Act.\textsuperscript{165} Rule 11 was promulgated pursuant to the Rules Enabling Act of 1934.\textsuperscript{166} The first sentence of 28 U.S.C. § 2072 grants the Supreme Court the authority to implement procedural rules.\textsuperscript{167} The second sentence of § 2072 limits this power so that the rules prescribed by the Court affect only procedural, and not substantive rights.\textsuperscript{168} The Court has addressed this limitation on its rulemaking authority in several contexts.\textsuperscript{169} In the context of Rule 11, the Court’s rulemaking power is limited by the existence of federal fee-shifting statutes.\textsuperscript{170}

In \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\textsuperscript{171} the Supreme Court delineated the policy that is commonly known as the “American

\textsuperscript{162} See, e.g., Sanko S.S. Co. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987) (providing that “the manner in which sanctions are imposed must comport with due process requirements’’); cf. Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (stating that “[l]ike other sanctions, attorney’s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record”).

\textsuperscript{163} See, e.g., Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985), aff’d in part, vacated in part and remanded, 836 F.2d 1156 (9th Cir.), superseding 827 F.2d 450 (9th Cir. 1987), aff’d and remanded, 898 F.2d 684 (9th Cir. 1990).


\textsuperscript{166} See \textit{supra} notes 50-55 and accompanying text.

\textsuperscript{167} 28 U.S.C. § 2072(a) (1988) provides in pertinent part that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure.”

\textsuperscript{168} 28 U.S.C. § 2072(b) provides that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”

\textsuperscript{169} Burbank, \textit{Enabling Act}, \textit{supra} note 165, at 1028 n.55 (citing a number of cases, most notably Sibbach v. Wilson & Co., 312 U.S. 1 (1941) and Hanna v. Plumer, 380 U.S. 460 (1965)).

\textsuperscript{170} See \textit{Marek} v. \textit{Chesny}, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (enumerating over 100 federal fee-shifting statutes).

\textsuperscript{171} 421 U.S. 240 (1975).
This policy prohibits federal courts from awarding attorney's fees in the absence of an applicable fee-shifting statute. In *Alyeska Pipeline*, the Court rejected a "private attorney general" exception to the American Rule. Although it declined to adopt a new exception to the American Rule, the Supreme Court emphasized that even in the absence of fee-shifting statutes, federal courts retain their inherent power to award attorney's fees against a party conducting bad faith litigation.

The American Rule, coupled with the substantive rights limitation of the Rules Enabling Act, form the premise of the third category of criticism. Because amended Rule 11 authorizes the award of attorney's fees in the absence of bad faith, it can be argued that the Rule modifies the substantive rights guaranteed by federal fee-shifting statutes. Accepting this argument, the remaining basis of authority necessarily fails because the inherent power of the federal courts is limited by the Supreme Court's decision in *Alyeska Pipeline* requiring bad faith before awarding attorney's fees. Thus, the 1983 amendment of Rule 11 flows from a questionable basis of authority.


173. *Alyeska Pipeline*, 421 U.S. at 247, 257-60. Unlike the English system, "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Id. at 247.

174. Id. at 245-47. Specifically, the Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Id. at 262; see also *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (stating that "the allocation of the costs accruing from litigation is a matter for the legislature, not the courts").

175. *Alyeska Pipeline*, 421 U.S. at 257-60. Bad-faith was one of three exceptions to the American Rule recognized in *Alyeska Pipeline*. See id. at 257-59.

176. See Burbank, *Sanctions*, supra note 165, at 1008-11 (noting that the proposed amendments to Rule 11 are inconsistent with existing, discretionary fee-shifting devices); Burbank, *Transformation*, supra note 78, at 1943-49 (explaining the difficulty in unravelling sanctions from adjudication on the merits); Cavanagh, supra note 113, at 502 (noting that fee-shifting and Rule 11 sanctions are "inextricably intertwined"); Nelken, *Middle Ground*, supra note 157, at 389 (noting that Rule 11 has become a vehicle for recouping attorney's fees); see also Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986) (finding "no clear line between attorneys' fees as damages and attorneys' fees as sanctions"), cert. denied, 480 U.S. 918 (1987). But see Parness, *Substance/Procedure*, supra note 172, at 401 (arguing the existence of a "substance/procedural dichotomy" in fee-shifting laws).


177. See *Alyeska Pipeline*, 421 U.S. at 258-59; see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (noting that a finding of bad faith must precede any sanction under the Court's inherent powers).
III. **BUSINESS GUIDES: APPLICATION OF THE OBJECTIVE REASONABLE INQUIRY STANDARD TO REPRESENTED PARTIES**

In *Business Guides, Inc. v. Chromatic Communications Enterprises*, the United States Supreme Court held that Rule 11 imposes an objective standard of reasonable inquiry on represented clients. As a result, a party may no longer rely in good faith solely upon the advice of its attorney, but must conduct an independent, reasonable inquiry into both the factual and legal basis of a filing before signing it. The *Business Guides* decision requires represented parties to satisfy this affirmative duty or face sanctions under the amended Rule. This extension of Rule 11 implicates the three categories of criticism generated by the Rule's amendment in 1983.

**A. The Majority Opinion: Rule 11 Should Be Given Its Plain Meaning**

The Supreme Court affirmed the decision of the United States Court of Appeals for the Ninth Circuit that Rule 11 imposes an objective reasonable inquiry standard on represented parties who sign papers to be filed in federal court. The majority began its analysis by asserting that the Federal Rules of Civil Procedure are to be given their plain meaning. The Court then determined that the objective certification standard in sentence [5] of the Rule clearly encompasses represented parties in addition to attorneys and pro se parties. In support of this conclusion, the Court embarked upon a detailed analysis of the text of Rule 11.

The Court contrasted the competing interpretations of sentence [5] to determine which was the most natural reading of the Rule's language. Business Guides argued that the text "attorney or party" in sentence [5] of the Rule should be read to mean "attorney or unrepresented party." The

---

179. Id. at 934-35.
180. See infra notes 222-37 and accompanying text, for a discussion of the *Business Guides* decision in relation to the criticism of Rule 11.
182. See id. at 928. "'We give the Federal Rules of Civil Procedure their plain meaning.' . . . [O]ur inquiry is complete if we find the text of the Rule to be clear and unambiguous." Id. (citation omitted).
183. "[5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and warranted by existing law . . . ." *Fed. R. Civ. P. 11.
185. See id. at 928-31.
186. Id.
187. Id. at 929-30.
Court, however, emphasized that whereas sentences [1] and [2] of the Rule explicitly distinguish between represented and unrepresented parties, no such distinction is drawn in sentence [5]. The Court asserted that "[b]y using the more expansive term ‘party,’ [sentence (5)] call[s] for more expansive coverage." In addition to rejecting Business Guides' argument that represented parties are beyond Rule 11's certification standard, the majority was also unconvinced by the company's argument that sentence [5] of the Rule nevertheless applies a subjective standard to represented parties. Again relying on the plain language of Rule 11, the Court determined that sentence [5] draws no distinction between attorneys and represented parties, but rather it unambiguously requires any signer to conduct a reasonable inquiry. Thus, giving Rule 11 its natural reading, the Court concluded that all signers of papers filed in federal court are held to an objective reasonable inquiry standard.

Lastly, the majority rejected Business Guides' argument that Rule 11, to the extent it imposes sanctions on clients who act in good faith, violates the Rules Enabling Act. Business Guides contended that because it acted in good faith, the sanctions imposed in this case constituted impermissible fee-shifting of the type prohibited by the Supreme Court in *Alyeska Pipeline*. The Court identified the substantial burden facing Business Guides when asserting a Rules Enabling Act challenge and held that Rule 11 sanctions were not fee-shifting because the "sanctions are not tied to the outcome of litigation." Moreover, the Rule does not mandate attorney's fees as an

---

188. *Id.*
189. *Id.* at 930. The Court continued, "[t]he natural reading of this language is that *any* party who signs a document, whether or not the party was required to do so, is subject to the certification standard of Rule 11." *Id.*
190. See *id.* at 931-33.
191. *Id.* at 931.
192. *Id.* Sentence [5] of Rule 11 "speaks of attorneys and parties in a single breath and applies to them a single standard." *Id.*
193. *Id.* at 933.
194. *Id.* at 933-34.
195. *Id.* at 934.
196. *Id.* at 933-34. The Court emphasized that Business Guides' challenge on this ground could succeed "‘only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions.’" *Id.* at 933 (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965)). In addition, the Court reiterated that "‘Rules which *incidentally* affect litigants’ substantive rights do not violate this provision [of the Enabling Act] if reasonably necessary to maintain the integrity of that system of rules.’” *Id.* at 934 (quoting Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987)).
197. *Id.*
appropriate sanction. Accordingly, the Court held that the sanctions imposed against Business Guides for failing to conduct an objectively reasonable inquiry were a proper application of Rule 11.

B. Justice Kennedy's Dissent

In the dissent, Justice Kennedy rejected the majority's interpretation of Rule 11, arguing that it exceeded the authority granted in the actual language of the Rule. Examining the complete text of Rule 11, the dissent argued that sentence [5] of the Rule must be construed with reference to sentences [1] and [2] as well as sentence [7]. Justice Kennedy concluded that Rule 11 binds only "those whose signatures are provided for in the Rule itself." Accordingly, the certification standard of sentence [5] applies only to the attorney representing a client and the unrepresented party appearing pro se because only their signatures are required by sentences [1] and [2] respectively. Moreover, sentence [7] of the Rule provides that an ap-
propriate sanction shall be imposed “upon the person who signed [the frivolous paper], a represented party, or both.” Under the dissent’s analysis of Rule 11, therefore, an attorney must violate the Rule before a represented party can be sanctioned and even then, such a sanction would be an abuse of discretion if the represented party acted in good faith.

Justice Kennedy also argued that the majority’s application of Rule 11’s reasonable inquiry standard to represented parties reaches well beyond the judiciary’s traditional power to regulate practice and procedure. Justice Kennedy emphasized that whereas the courts have traditionally regulated the standards appropriate for the bar, the federal judiciary has no similar expertise with regard to the “workings of private enterprise.” The dissent contended that such an application of Rule 11 exceeds the Court’s rulemaking authority because it redistributes litigation costs in a manner similar to the fee-shifting theory rejected in *Alyeska Pipeline*. The dissent asserted that when used as a fee-shifting mechanism, Rule 11 threatens to chill the filing of meritorious lawsuits. Accordingly, the dissent concluded that by imposing an objective standard of reasonable inquiry on a represented party, the majority’s interpretation of Rule 11 is a breach of the substantive rights limitation of the Rules Enabling Act.

IV. THE CASE FOR RULE 11 REFORM

Although the *Business Guides* case illustrates precisely the egregious conduct that Rule 11 is intended to discourage, the Supreme Court’s decision is


206. *Id.* at 942.

207. *Id.* at 940-42.

208. *Id.* The dissent continued:

though the majority would seem to suggest it, I should not have thought that before a person or entity seeks the aid of the federal courts, it ought to know the contents of the Federal Rules of Civil Procedure, rules that, at least until now, were the domain of lawyers and not the community as a whole.

*Id.* at 942.

209. *Id.* at 940-41. Justice Kennedy pointed out that the majority’s attempt to distinguish “the fee-shifting at issue in *Alyeska Pipeline* breaks down in a case like this one where the ‘discrete event’ was the filing of the lawsuit and the ‘appropriate sanction’ was the payment of [Chromatic’s] attorney’s fees.” *Id.* at 941 (referring to Justice O’Connor’s argument at page 934 of the opinion).

210. *Id.* Therefore, the dissent resolved that “[w]hether or not Rule 11 as construed by the majority exceeds our rule-making authority, these concerns weigh in favor of a reasonable, alternative interpretation, one which . . . is more consistent with the text of the Rule.” *Id.* at 942.

211. See *id.*
not faithful to the plain language of the Rule and exhibits several of the problems revealed by the judicial and scholarly criticism surrounding amended Rule 11. In an attempt to advance the underlying purpose of the Rule, the Court incorrectly extended Rule 11 beyond its plain meaning when it failed to confront several portions of the Advisory Committee’s Note that contradicted its interpretation of the Rule’s language.

A. Rule 11’s Technical Flaw

The Business Guides majority failed to address the Advisory Committee’s focus on the attorney’s conduct in amending Rule 11. In discussing the amended certification standard, the Advisory Committee’s Note indicates that the affirmative duty relates to attorneys. Although it provides that sanctions may be imposed upon a represented party as well as the attorney for a violation of Rule 11, the Committee’s Note nevertheless contemplates that the signer subject to the objective reasonable inquiry requirement will be the attorney and not the client. As guidance on this issue, the Advisory Committee’s Note relies on Browning Debenture Holders’ Committee v. DASA Corp.

In Browning, the United States Court of Appeals for the Second Circuit held that attorney’s fees should not be imposed upon a represented party unless the party was personally “aware of or otherwise responsible for the procedural action instituted in bad faith.” The reference to Browning in the Advisory Committee’s Note arguably indicates that sanctions imposed against represented parties under Rule 11 should be limited to bad faith con-

212. See supra text accompanying notes 130-77.
213. See FED. R. CIV. P. 11 advisory committee’s note.
214. The Advisory Committee’s Note refers to “[t]he expanded nature of the lawyer’s certification in the fifth sentence of amended Rule 11.” Id. (emphasis added). See Business Guides, 111 S. Ct. at 937 (Kennedy, J., dissenting).
215. The Advisory Committee’s Note states that “[i]f the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides.” FED. R. CIV. P. 11 advisory committee’s note (emphasis added).

The failure of the Advisory Committee’s Note to mention the signature of a represented party in this sentence assumes that “the duty imposed by the rule” is only violated by the attorney’s signature. See Business Guides, 111 S. Ct. at 937. Support for this interpretation is found in the very next paragraph of the Advisory Committee’s Note which continues, “[e]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.” FED. R. CIV. P. 11 advisory committee’s note (citing Browning Debenture Holders’ Comm. v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977)) (emphasis added); see Business Guides, 111 S. Ct. at 937.
216. 560 F.2d 1078 (2d Cir. 1977).
217. Id. at 1089.
duct which would also justify an award of attorney's fees under the court's inherent powers.\textsuperscript{218}

These references to the Advisory Committee's Note, coupled with the dissent's reasonable analysis of Rule 11's plain language,\textsuperscript{219} support the conclusion that Rule 11 technically does not reach the egregious conduct found in *Business Guides*.\textsuperscript{220} Although imposing sanctions despite the technical flaw in Rule 11's language serves the underlying purpose of the Rule, such a decision raises serious collateral difficulties.\textsuperscript{221}

### B. Collateral Problems of Rule 11

The *Business Guides* decision manifests the problems that mark the unpredictable application of Rule 11.\textsuperscript{222} This novel interpretation of Rule 11 in the lower courts of the Ninth Circuit produced extensive satellite litigation, including three separate evidentiary hearings by a magistrate to determine the appropriate sanction,\textsuperscript{223} as well as appeals to both the Ninth Circuit Court of Appeals\textsuperscript{224} and the Supreme Court.\textsuperscript{225} Moreover, the Supreme Court affirmed a court of appeals decision which vacated the district court


\textsuperscript{219} See supra notes 200-211 and accompanying text.

\textsuperscript{220} Judge Weinstein anticipated this technical flaw in the language of Rule 11 in *Eastway*: In the case in which it was suggested that fees be assessed against the client alone, Rule 11 does not—technically speaking—even apply. Rule 11 does not, by its terms, provide for sanctions against the filing of frivolous papers. Rather, it provides for sanctions against an attorney's filing papers without making an adequate inquiry. In a case in which an attorney makes a reasonable inquiry into the facts but still ends up filing a frivolous pleading because his client deceived him, there has technically not been any violation of Rule 11. Consequently, there is technically no basis for the imposition of sanctions, even against the client who in bad faith induced the filing [of] a frivolous suit. This conclusion, however, is completely at odds with the spirit of the Rule. It would also lead to bizarre consequences, because it would mean that clients could be sanctioned in cases where they were partially responsible for filing frivolous papers, but not in cases where their responsibility was total. The better conclusion is that sanctions may be imposed against the client under the circumstances described above despite the flaw in the Rule's language.


\textsuperscript{221} See infra text accompanying notes 222-37.

\textsuperscript{222} See supra notes 134-55 and accompanying text.


\textsuperscript{224} \textit{Id.} at 803.

order and remanded the case for reconsideration of the sanction imposed. \(^{226}\) Business Guides, therefore, illustrates the inordinate amount of satellite litigation spawned by the indeterminant application of the Rule's language. \(^{227}\)

In addition, unpredictability undermines Rule 11's effectiveness as a deterrent and chills legitimate advocacy in the long-term. \(^{228}\) Business Guides is again instructive; for although the majority opinion settles an issue of conflict concerning the interpretation of Rule 11, \(^{229}\) the decision in fact opens the door to another area of Rule 11 discord. \(^{230}\) Justice Kennedy recognized this problem as the corollary to extending the Rule's text beyond its logical reach when he noted that the majority expressly preserved the issue of what standard would apply in deciding whether to impose Rule 11 sanctions against a represented party who has not signed a frivolous filing. \(^{231}\)

Finally, as the courts stray further and further from the plain language of Rule 11, their sanctioning authority becomes ever more murky. \(^{232}\) The Rules Enabling Act represents Congress' intent that the courts regulate practice and procedure but leave the definition of substantive rights to federal law. \(^{233}\) The majority's interpretation of Rule 11 in Business Guides runs afool, or at least walks the edge, of this limitation. \(^{234}\) Despite an express finding of good faith, \(^{235}\) Business Guides was sanctioned in an amount equal to Chromatic's attorney's fees for its failure to conduct a reasonable inquiry before filing affidavits in support of a TRO. \(^{236}\) Arguably, therefore, the Supreme Court redistributed litigation costs in the absence of bad faith—a remedy that is not authorized by federal law or the Court's inherent powers. \(^{237}\)

\(^{226}\) Id.

\(^{227}\) See supra notes 156-64 and accompanying text.

\(^{228}\) See supra notes 134-55 and accompanying text.

\(^{229}\) See supra text accompanying notes 14-22.

\(^{230}\) See Business Guides, 111 S. Ct. at 935 (preserving the issue of "whether or under what circumstances a non-signing party may be sanctioned" under Rule 11); see also id. at 941 (Kennedy, J., dissenting) (underscoring the open issue).

\(^{231}\) Id. at 941. "The chilling impact of the majority's negligence standard will be much greater if the majority applies it in that circumstance as well." Id. (Kennedy, J., dissenting).

\(^{232}\) See id. at 943; see also supra text accompanying notes 165-77 (framing the argument that amended Rule 11 violates the substantive rights limitation of the Rules Enabling Act).


\(^{234}\) See Business Guides, 111 S. Ct. at 942.

\(^{235}\) See id. at 926.

\(^{236}\) Id. at 927.

\(^{237}\) See supra notes 165-77 and accompanying text.
C. The Necessary Reform

The Business Guides decision reveals the inadequacies in the text of Rule 11. Specifically, an examination of the majority and dissenting opinions demonstrates that the plain text of the Rule technically does not reach the very conduct at issue in that case. The Court nevertheless sanctioned the company since deterrence of this type of egregious conduct was clearly within the spirit of Rule 11. Under such circumstances, where the central purpose underlying the Rule is not adequately advanced by the plain meaning of its text, Rule 11 should be revised so as to better deter abuses of the judicial process.

The Advisory Committee on Civil Rules published a call for written comments on Rule 11 on January 24, 1990. After reviewing the empirical research and public commentary that it received, the Advisory Committee completed a preliminary draft of its proposed amendment to Rule 11. Included in the preliminary draft is an amendment that would reverse the Supreme Court's decision in Business Guides. This amendment to Rule 11 would permit monetary sanctions to be imposed against a represented party only where the party has filed a paper for an "improper purpose, such

---

239. See Business Guides, 111 S. Ct. at 930.
240. The call for written comments on Rule 11 was published at 59 U.S.L.W. 2117 (1990) and 131 F.R.D. 344 (1990).
241. See Wiggins et al., supra note 125, at 35-40 (publishing the full text of the proposed amended Rule as well as describing the proposed changes).
242. The preliminary draft provides, in relevant part, that Rule 11 sanctions may be imposed against a represented party only for a violation of section (b)(1) as follows:

(b) REPRESENTATIONS TO COURT. By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances—

(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

(c) SANCTIONS. Subject to the conditions stated below, the court shall impose an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of subdivision (b).

. . .

(2) NATURE OF SANCTION; LIMITATIONS.

. . .

(A) Monetary sanctions may not be awarded either on motion or on the court's initiative, against a represented party unless it is determined to be responsible for a violation of subdivision (b)(1).

See id. at 40.
as to harass or to cause unnecessary delay or needless increase in the cost of litigation."243 By limiting monetary sanctions against a represented party to situations involving bad faith, the proposed amendment would avoid any conflict with the Rules Enabling Act by bringing Rule 11 into line with federal fee-shifting statutes,244 the federal judiciary's inherent sanctioning power,245 and Rule 56(g) of the Federal Rules of Civil Procedure.246 Adoption of this portion of the Advisory Committee's proposed amendment to Rule 11, moreover, would benefit both litigants and the courts by clarifying the circumstances under which clients should be sanctioned which in turn should enhance deterrence.247

V. CONCLUSION

Rule 11 of the Federal Rules of Civil Procedure imposes an affirmative duty upon attorneys and unrepresented parties to certify that prior to filing any paper with the court, they have conducted a reasonable inquiry into the factual and legal basis of the paper. This certification is evaluated by an objective standard of reasonableness under the circumstances. When a paper is signed in violation of this standard, Rule 11 mandates the imposition of sanctions against the signer. The United States Supreme Court held in Business Guides, Inc. v. Chromatic Communications Enterprises that a represented party who signs a paper without first conducting an objective reasonable inquiry shall be sanctioned under Rule 11.

The Court grappled with the anomalous possibility that Rule 11's plain language did not technically encompass conduct that so egregiously violated the spirit of the Rule. Adhering to the central purpose underlying Rule 11, the Rule was interpreted so as to reach the conduct at issue. The Court's tenuous interpretation of the plain language of the Rule confirmed much of the critical literature surrounding Rule 11 generally. Business Guides, in this sense, fortifies the case for Rule 11 reform.

Scott B. Gilly

243. See id.
244. See supra notes 170-77 and accompanying text.
245. See id.
246. FED. R. CIV. P. 56(g) permits the court to award attorney's fees against a party who submits an affidavit, supporting or opposing summary judgment, in bad faith or for purposes of delay.
247. See supra notes 134-55.